Filed 9/7/16 Crocket v. Outdoor Channel Holdings CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RICHARD A. CROCKET et al., Plaintiffs and Appellants, v. OUTDOOR CHANNEL HOLDINGS, INC., et al., Defendants and Respondents.	G050906 (Super. Ct. No. MCC1300001) O P I N I O N

Appeal from an order of the Superior Court of Riverside County, Gloria Trask, Judge. Request for judicial notice. Request granted in part. Order affirmed.

Bramsom, Plutzik, Mahler & Birkhaeuser, Alan R. Plutzik, Michael S. Strimling; Pomerantz, Gustavo F. Bruckner and Samuel J. Adams for Plaintiffs and Appellants.

Wilson Sonsini Goodrich & Rosati, David J. Berger, Steven D. Guggenheim and Thomas J. Martin for Defendants and Respondents.

Plaintiffs and appellants Richard A. Crocket and Kurt Hueneke (plaintiffs), shareholders in defendant and respondent Outdoor Channel Holdings, Inc. (Outdoor), filed a putative class action (Complaint)[1] challenging a proposed merger between Outdoor and InterMedia Outdoors Holdings, LLC (InterMedia).[2] After Outdoor was ultimately acquired by Kroenke Sports and Entertainment, LLC (KSE) and plaintiffs' action was dismissed, plaintiffs sought an award of attorney fees, arguing their action provided a substantial benefit to Outdoor shareholders because it caused the increased purchase price paid by KSE.

Plaintiffs claim the court erred in denying their motion, arguing Delaware law, not California law, should have been applied, and they satisfied the required Delaware elements entitling them to an award of fees. Alternatively they contend that even applying California law they were entitled to attorney fees.

Using Delaware law, which is more favorable to plaintiffs, we conclude there is no basis to award attorney fees under the substantial benefit doctrine. We need not address any of the other arguments and affirm the order.

FACTS

In November 2012 Outdoor, a California corporation, and InterMedia, a Delaware corporation, announced they had entered into an Agreement and Plan of Merger (IMOH Agreement) that would ultimately create a new publically held Delaware

---

[1] Crocket and Hueneke each filed a separate action. They were subsequently consolidated.

[2] In addition to Outdoor, plaintiffs sued defendants and respondents Perry Massie, Thomas Massie, David Merritt, Ajit Dalvi, Michael Pandzik, Roger L. Werner, Jr., Thomas Hornish, Thomas Bahnson Stanley, and David Kinley (defendant officers and/or directors; collectively with Outdoor, defendants), who were members of Outdoor's board of directors or corporate officers or both. InterMedia was a named defendant but is not a party to this appeal.

corporation, InterMedia Outdoor Holdings, Inc. (IMOH). Under the IMOH Agreement, for each Outdoor share owned an Outdoor shareholder could elect to receive $8.00 per share, one share of common stock of IMOH, or a combination of cash and common stock.

Outdoor and InterMedia filed a Form S-4 Registration Statement (Proxy) with the Securities and Exchange Commission (SEC). The Proxy stated the estimated $8.00 per share value was not certain because of the unpredictability of the market for the new IMOH common stock. A vote on the IMOH Agreement was scheduled for March 13, 2013.

On December 18, 2012 and January 15, 2013 the SEC provided written comments (December Comments and January Comments, respectively) to the Proxy. The December Comments were nine pages long and required IMOH to file an amended registration and provide additional information covering a range of topics, including the background of the merger. This included an explanation of Outdoor's consideration of all possible "strategic alternatives and the potential advantages and disadvantages of those alternatives."

IMOH was also required to "[d]isclose with specificity" the role Hornish, the chief executive officer (CEO) and a director of Outdoor, and Outdoor's defendant officers and/or directors had played in negotiating membership in IMOH's management, who themselves would serve as president and CEO, and chief financial officer and chief operating officer, respectively.

The December Comments also sought information regarding Outdoor's reasons for the merger, including the current and projected financial conditions and how those factors influenced Outdoor's board, plus the projected "'significant operating synergies.'" The SEC noted the financial projections were incomplete and asked for additional information. Additionally it required production of any materials on which Outdoor's financial advisor relied to render the fairness opinion.

On January 8, and January 23, 2013, IMOH filed written responses and amended proxies (First Amendment and Second Amendment, respectively).

On January 2 and February 4, 2013, the two actions were filed They alleged Outdoor's board members breached their fiduciary duties by agreeing to insufficient consideration using an unfair process, and Outdoor and InterMedia aided and abetted such conduct. Plaintiffs pleaded defendant officers and/or directors, who held 42.5 percent of the shares, had secured stock options and positions with IMOH after the proposed merger and favored the IMOH Agreement for that reason, to the detriment of Outdoor's shareholders. According to the Complaint, the IMOH Agreement contained "onerous and preclusive deal protection devices" that would ensure there would be no competing offers. The Complaint also pleaded the Proxy failed to contain certain material information. Plaintiffs sought to enjoin the merger if defendants failed to disclose additional information.

On January 18 plaintiffs sent a letter (January 18 Letter) to defendants outlining the information they demanded be disclosed that was not included in the First Amendment.

On February 7 pursuant to a stipulation and protective order Outdoor began producing certain nonpublic documents in response to plaintiffs' requests. On February 22 plaintiffs sent a second letter (February 22 Letter) asking for additional information and demanding changes in the IMOH Agreement.

On February 26, upon granting an ex parte motion requesting an expedited hearing on a request for preliminary injunction plaintiffs sought to file, the court set a hearing for March 8. Pursuant to the order, plaintiffs filed the preliminary injunction motion (Preliminary Injunction Motion) the next day. It sought to enjoin the calendared March shareholder vote on the IMOH Agreement until trial or until defendants made certain changes to the IMOH Agreement.

On February 27, KSE sent an unsolicited proposal (KSE Proposal) to purchase Outdoor, for all cash at $8.75 per share. On March 4 Outdoor issued a press release (March 4 Press Release) acknowledging the KSE Proposal, stating it had determined it would likely result in a "'Superior Proposal'" as defined in the IMOH Agreement, and authorized discussions with KSE.

In the March 4 Press Release Outdoor also noted the IMOH Agreement was still in effect, and advised shareholders not to take any action as to the KSE Proposal at that point. Outdoor was not withdrawing its recommendation as to the IMOH Agreement or "proposing to do so" and was not making a recommendation as to the KSE Proposal. It affirmed the recommendation Outdoor shareholders vote to adopt the IMOH Agreement. That same day counsel for KSE called plaintiffs' lawyers, asking them not to withdraw the Preliminary Injunction Motion.

On March 7 Outdoor announced it had found the KSE Proposal superior and a merger agreement with KSE had been negotiated (March 7 Press Release). Outdoor explained it had notified InterMedia it intended to terminate the IMOH Agreement, unless InterMedia made an offer superior to the KSE Proposal. The next day Outdoor announced it would adjourn the scheduled InterMedia shareholder vote on the IMOH Agreement.

On March 12, InterMedia submitted a revised offer, adding a share of redeemable preferred stock (March 12 InterMedia Offer). That same day the Outdoor board met to consider that offer and determined it was not superior for several reasons. Included was the "expected illiquidity" of the preferred stock and the unfavorable interest rate of the coupon. According to one Outdoor board member, "the board felt that ultimately an all-cash offer at an appropriate price was superior to a cash and merger deal once it was fully risk-adjusted. And that's why the [KSE] cash offer was accepted."

On March 13 Outdoor notified InterMedia it was terminating the IMOH Agreement and entered into an agreement for KSE to purchase Outdoor for $8.75 cash

per share. The Preliminary Injunction Motion was subsequently taken off calendar. On March 22, after plaintiffs refused to dismiss the Complaint on the grounds it was moot, defendants filed a demurrer.

Beginning April 30, KSE and InterMedia began a bidding war to purchase Outdoor, each submitting increased bids over the next week. On May 8, Outdoor accepted KSE's bid of $10.25 per share cash, and 96 percent of the shareholders approved the transaction (Purchase).

Plaintiffs then filed a nonopposition to the demurrer, which was sustained without leave to amend in June.

Thereafter, plaintiffs filed their motion for attorney fees (Attorney Fee Motion). They argued that as a result of their action, Outdoor shareholders had received a $57 million benefit from the price KSE paid as opposed to InterMedia's original offer. Plaintiffs also claimed their suit caused additional proxy information to be disclosed, benefitting Outdoor shareholders.

Defendants opposed the Attorney Fee Motion, arguing plaintiffs had failed to comply with California law by filing a presuit demand or seeking fees against the benefitted class. It also asserted the suit did not benefit Outdoor shareholders because it had nothing to do with KSE's unsolicited bid. Moreover, supplemental disclosures were in response to SEC demands, not plaintiffs' Complaint.

At the first hearing on the Attorney Fee Motion, the court initially stated its tentative ruling was to award reasonable fees. It anticipated continuing the matter because the Attorney Fee Motion did not contain detailed billing statements. By the end of the hearing, the court noted the arguments had "given the Court some more to think about." It took the matter under submission to again review the Attorney Fee Motion and opposition documents. Subsequently the court continued the hearing for plaintiffs to file billing statements. It specifically noted it was not ruling on the merits.

By the time of the second hearing, the matter had been assigned to a different judge. At the beginning of the hearing, after noting she had reviewed everything that had been filed and the prior minute order, the judge announced her intention to deny the Attorney Fee Motion.

At the conclusion of argument, the court ruled it could not see that plaintiffs "performed a substantial benefit or that there was a causal connection or [plaintiffs] conferred a benefit." It "just [could not] make that link." The court found the "facts are undisputed. Certainly [Outdoor] was sold for a greater amount . . . [b]ut I can't find that that was the result [of] counsel's work." The court later stated, "certainly plaintiff[s'] counsel's participation is involved. But was it your participation, or was it the SEC, or it was [*sic*] [KSE] independently? I can't - - I can't find that one is more likely than the other to have caused this to happen." The court then denied the Attorney Fee Motion.

Additional facts are set out in the discussion.

REQUEST FOR JUDICIAL NOTICE

Plaintiffs filed a request for judicial notice of two documents: the transcript of a hearing in the Delaware Court of Chancery documenting a ruling that a settlement of a related Delaware case did not bar plaintiffs from seeking attorney fees in the case before us; and the Schedule 14A Preliminary Proxy Statement filed by Outdoor with the SEC on March 21, 2013 containing the recommendation to accept the offer from KSE for $8.75 per share all cash. Defendants oppose the request only as to the transcript. We take judicial notice of the proxy statement and deny the request as to the transcript.

Plaintiffs did not explain the relevance of the transcript to the appeal, in violation of California Rules of Court, rule 8.252(a)(2). We do not see how those

proceedings in Delaware[3] have any bearing on whether the court properly denied attorney fees here.

Defendants also filed a request for judicial notice of two documents: plaintiffs' brief filed in the Delaware Court of Chancery after their Attorney Fee Motion in this case was denied, in which they contended the denial of that motion was erroneous and seeking permission to file a request for attorney fees in the Delaware court; and defendants' opposition to that brief, which argued the request was an improper collateral attack on the ruling in our case and asked the court to deny it.

Defendants too failed to comply with California Rules of Court, rule 8.252(a)(2), by failing to explain why these documents are relevant to our appeal. We see no relevance. Therefore, despite plaintiffs' failure to oppose the request, we deny it.

DISCUSSION

1. Standard of Review and Choice of Law

There are several issues before us, to which different standards of review apply. Initially, there is a dispute whether Delaware or California law applies. Defendants argue we should use California law while plaintiffs contend the more favorable Delaware law should be used. Both agree this question is subject to de novo review. (*Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1144.)

In addition, we conduct de novo review of whether the court had authority to award attorney fees. (See *In re State* (Del. 1998) 708 A.2d 983, 985.) But we ultimately review denial of a request for attorney fees for an abuse of discretion. (*Alaska Elec. Pension, Fund v. Brown* (Del. 2010) 988 A.2d 412, 417.)

[3] In their brief plaintiffs also refer to the Delaware action in which they objected to the settlement and sought an order that it did not bar their Attorney Fee Motion in this case. The Delaware court granted that request. This is not relevant to the question before us and we do not rely on it in any manner in deciding this case.

We need not decide whether to apply California or Delaware law, because even using Delaware law, the court did not abuse its discretion in denying attorney fees.

2. No Corporate Benefit and No Attorney Fees

Plaintiffs argue they are entitled to attorney fees pursuant to the Delaware corporate benefit doctrine. That doctrine is an exception to the American Rule that requires a prevailing party to pay its own attorney fees. (*In re First Interstate Bancorp Consolidated Shareholder Litigation* (Del.Ch. 1999) 756 A.2d 353, 357.)

The substantial benefit doctrine provides that attorney fees may be awarded if the following elements are satisfied: "(1) the suit was meritorious when filed, (2) the defendants took an action that produced a corporate benefit before the plaintiffs obtained a judicial resolution, and (3) the suit and the corporate benefit were causally related." (*EMAK Worldwide, Inc. v. Kurz* (Del. 2012) 50 A.3d 429, 432, fn. omitted.) We conclude that at minimum the third element was not satisfied.

Although conclusorily stating plaintiffs cannot prevail under either California or Delaware law, defendants do not discuss the Delaware corporate benefit doctrine but argue California law. Because the substantial benefit theories in the two states are similar, defendants' discussion of California law shows they do not seriously dispute the first two elements. They focus instead on whether plaintiffs' acts caused any corporate benefit to Outdoor. Thus we turn our attention there as well.

Where a defendant takes an action after suit is filed that moots the plaintiff's claim, under the "'mootness rule'" "there is a rebuttable presumption the suit and the benefit were causally related because the defendant is in the best position to know the events, reasons, and decisions behind its action." (*EMAK Worldwide, Inc. v. Kurz, supra,* 50 A.3d at p. 433, fn. omitted.)

To overcome the presumption, defendants must show the suit "'did not in any way cause their action.'" (*Alaska Elec. Pension, Fund v. Brown, supra,* 988 A.2d at p. 418, fn. omitted.) "A rebuttable presumption . . .'imposes on the party against whom it

is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.'" (*Id.* at pp. 417-418, fn. omitted [denial of attorney fees under corporate benefit doctrine affirmed; the defendant rebutted presumption suit caused benefit].) The record shows defendants rebutted the presumption here.

The Complaint essentially alleges defendant officers and/or directors, who had a conflict of interest, breached their fiduciary duties by entering into the IMOH Agreement, which offered an inadequate price and failed to make sufficient disclosures to provide shareholders and other bidders enough information to be able to sufficiently evaluate the IMOH Agreement. By bringing suit and seeking additional information, plaintiffs claim, they forced defendants to file the Amendments that disclosed additional information. The Preliminary Injunction Motion "maintain[ed] pressure" on defendants to fairly consider the KSE Proposal and reject the IMOH Agreement. This ultimately led to a bidding war between InterMedia and KSE resulting in a better deal for purchase of Outdoor in the amount of $57 million.

Plaintiffs point to several pieces of evidence, which they claim support the presumption their actions benefited Outdoor shareholders. They contend defendants have not rebutted the presumption of causation. Plaintiffs are mistaken.

Plaintiffs focus on the amendments to the Proxy, arguing the First Amendment was filed after and therefore in response to the Complaint, and the Second Amendment was filed because plaintiffs sent defendants the January 18 Letter asking for more information about the IMOH Agreement.

However, according to the declaration of Vincent G. Buehler, one of the attorneys who represented defendants in the purchase, none of the additional disclosures made in the First and Second Amendments had anything to do with the Complaint or any demands by plaintiffs for information. The Amendments and disclosures were solely in response to the January Comments.

Plaintiffs argue there is no evidence the action did not influence the SEC's January Comments. We disagree. The first sentence of the January Comments states it was sent as a result of the SEC reviewing the registration statement. That is sufficient to defeat any presumption plaintiffs' action had anything to do with them. The fact the January Comments were sent after the Complaint was filed is coincidence, at best. Coincidence is not causation.

Plaintiffs also contend the information provided in response to the January 18 Letter highlighted the unfairness of the IMOH Agreement and thereby provided a benefit to the Outdoor shareholders. That is not the case.

First, the December and January Comments sought substantial additional information as to the terms of the IMOH Agreement. Only a small portion of the nine-page December Comments is set out above. The January Comments comprised another five pages. And defendants responded to those January Comments by filing the First and Second Amendments to the Proxy, totaling 20 pages. Thus defendants provided a significant amount of supplemental information, irrespective of the Complaint or the January 18 or February 22 Letters. (See *In re TD Banknorth Shareholders Litigation* (Del.Ch. 2007) 938 A.2d 654, 669 [denying attorney fees award in class action where, in part, "most substantive disclosures . . . attributable to the work of the SEC's staff"].)

More importantly, any additional information plaintiffs obtained about the IMOH Agreement had nothing to do with the ultimate Purchase by KSE. Whatever information plaintiffs might have obtained from defendants was irrelevant since the Outdoor shareholders never voted on the IMOH Agreement.

Further, E. Stanley Kroenke (Kroenke), the owner and chairman of KSE, filed a declaration in opposition to the Attorney Fee Motion that explained the basis for and thinking behind the KSE Proposal. The declaration shows Kroenke submitted the KSE Proposal independently of the IMOH Agreement or the litigation.

As background, Kroenke describes KSE as "one of the world's leading ownership, entertainment and management groups." It owns or operates several sports venues and professional sports teams, a regional television network, a "retail provider," and a ticket provider for its teams and venues. It has an indirect one-half interest in the World Fishing Network (WFN), a television network specializing in fishing and outdoor living.

Kroenke had been interested in Outdoor[4] for over a year before the IMOH Agreement was announced. He believed if there was a merger between Outdoor and KSE, either WFN or KSE's sports and entertainment network and Outdoor could achieve "synergies." In 2010 WFN and Outdoor contemplated a possible transaction and executed a confidentiality agreement in that regard. Although WFN submitted an "indication of interest," no agreement was ever reached. But Kroenke retained his interest in Outdoor.

After the standstill provision of the confidentiality agreement expired, Kroenke began purchasing Outdoor shares two weeks before the IMOH Agreement was announced. He continued to buy shares after the announcement through February 2013.

In mid-February Kroenke learned the Outdoor shareholders' vote on the IMOH Agreement was set for mid-March and decided to make an offer to purchase Outdoor. Neither his decision to purchase nor the offered price was based on any disclosures in the Proxy, the First and Second Amendments, or any information obtained by plaintiffs.

Kroenke decided to offer $8.75 cash in his initial offer based on the Proxy, his knowledge of Outdoor, and in consultation with his financial advisor. Any increased prices offered were the result of InterMedia's increased bids, information obtained through KSE's due diligence, the value of Outdoor to KSE, and further consultation with

[4] Outdoor operated a television network specializing in fishing, hunting and a western lifestyle.

his financial advisor. Thus Kroenke's declaration makes clear there was no causal connection between any information about the IMOH Agreement plaintiffs might have obtained and the original KSE Proposal or the ultimate price KSE paid for the Outdoor shares.

Moreover, the unsolicited KSE Proposal refutes plaintiffs' claim the "onerous and preclusive deal protection devices" contained in the IMOH Agreement ensured there would be no competing offers.

Plaintiffs also direct our attention to the Preliminary Injunction Motion, attributing to it multiple benefits. They most heavily emphasize that after it was filed, on the day the March 4 Press Release was issued, KSE lawyers called plaintiffs' counsel asking them not to take the Preliminary Injunction Motion off calendar. They claim that motion "level[ed] the playing field" and forced Outdoor to treat KSE fairly and thus shows their litigation was a substantial influence on Outdoor accepting the KSE Proposal.

This does not correspond to the record. First, there is no evidence the Outdoor board had any knowledge of this call, or therefore, that the call had any impact. Second, the record shows the ultimate price offered by KSE was higher than that offered by InterMedia. There are no facts or reasonable inferences that defendants would have continued to opt to recommend the IMOH Agreement over the superior KSE Proposal. And there is no evidence or reasonable inference defendants ever treated KSE unfairly or gave short shrift to the KSE Proposal, contrary to plaintiffs' claim.

Plaintiffs underscore the alleged commitment to the IMOH Agreement by defendant officers and/or directors who had secured positions with IMOH after the proposed merger. Plaintiffs speculate this alleged breach of fiduciary duty would have caused defendants to continue to support the IMOH Agreement even when it was inferior. Again, there is no evidence to support such a claim.

Plaintiffs rely heavily but selectively on the March 4 Press Release. They emphasize the portion of the release that Outdoor was not withdrawing its

recommendation as to the IMOH Agreement or recommending the KSE Proposal. But plaintiffs repeatedly neglect to address or even mention language in the same March 4 Press Release in which Outdoor stated it had concluded the offer from KSE would be a superior proposal or that Outdoor had authorized discussions with KSE.

The March 4 Press Release was not an unequivocal rejection of the KSE Proposal nor was it unequivocal support of the IMOH Agreement as plaintiffs would characterize it. Instead, it was a reasonable response to an unsolicited offer it had just received. It noted "there [was] no assurance" discussions with KSE would lead to a "definitive agreement" or any binding offer or the terms of any final agreement. In light of the existing IMOH Agreement, it was prudent for Outdoor to have advised shareholders not to take any immediate action as to the KSE Proposal. It is wishful thinking at best to conclude it was plaintiffs' Complaint and Preliminary Injunction Motion that ultimately prompted defendants to accept the KSE Proposal and reject the IMOH Agreement.

Further, only three days after the March 4 Press Release, Outdoor announced it had determined the KSE Proposal was superior and gave InterMedia four days to make a better proposal. When the March 12 InterMedia Offer was submitted, defendants immediately took up consideration of that offer, coming to the conclusion it was inferior financially and from a risk standpoint, and rejected it that same day. This defeats defendants' speculative claim that but for the litigation, defendants "*may very well have* deemed" (italics added) the "facially higher" March 12 InterMedia Offer superior and accepted it because of the "significant incentives to enter into a deal with InterMedia."

Plaintiffs manufacture out of thin air their argument that the pending litigation influenced Outdoor to accept the KSE Proposal and terminate the IMOH Agreement. It is self evident Outdoor accepted the KSE Proposal, and correspondingly terminated the IMOH Agreement, due to KSE's superior offer. The assertion that it was

only plaintiffs' litigation that caused defendants to abandon their favoritism toward IMOH and finally accept the KSE Proposal is undermined by the fact that the 42.5 percent shareholders whom plaintiffs had alleged breached their fiduciary duty were poised to be some of the largest beneficiaries of the superior KSE Proposal. (See *Globis Partners, L.P. v. Plumtree Software, Inc*., (Del.Ch. Nov. 30, 2007) No. 1577-VCP, 2007 WL 4292024, *8.) The nonexistence of that fact is plainly more probable than its existence. (*Alaska Elec. Pension, Fund v. Brown, supra*, 988 A.2d at pp. 417-418.)

Plaintiffs also take credit for the bidding war between InterMedia and KSE, arguing it was generated, at least in part, by the litigation. This claim is spun from whole cloth.

In his declaration Kroenke disclaims KSE was in any way influenced by supplemental disclosures for which plaintiffs take credit, and states KSE raised its bids "to stay competitive." According to Kroenke KSE's bid "was made in the context of a public bidding contest . . . and was made based on independent analyses by KSE and its financial advisors of the value of Outdoor Channel to KSE." Kroenke declared it was "absurd for Plaintiffs to claim credit for any portion of the increase in consideration" paid to Outdoor.

In addition, nothing was happening in the litigation. By the time of the bidding war, the Preliminary Injunction Motion had been dismissed at plaintiffs' request. The only thing pending was defendants' demurrer. There is no basis to presume plaintiffs' action had anything to do with the bidding war, even indirectly, as plaintiffs allude.

Plaintiffs direct us to the court's comment that "certainly plaintiffs[']counsel's participation is involved." But "involved" does not equate to causal relation. In any event we are not clear as to what the court meant. What is clear, however, is the court's explicit statement it could not find the increased price paid by KSE "was the result [of plaintiffs'] counsel's work."

Plaintiffs repeatedly mention that the first judge who heard the Attorney Fee Motion suggested he would grant it once evidence of a reasonable amount of fees was presented. They complain the second judge denied the Attorney Fee Motion despite that.

The first judge's inclination to grant the Attorney Fee Motion is completely irrelevant to the correctness of the ultimate ruling by the second judge. There was only one ruling, that denying the Attorney Fee Motion. An initial judge's preliminary comments are not persuasive and do not in any way suggest the ruling before us was incorrect.

Even a tentative ruling does not require the same judge to make a consistent final ruling. "[A] trial court's tentative ruling is not binding on the court; the court's final order supersedes the tentative ruling." (*Silverado Modjeska Recreation & Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 300.) Further, "'[a] judge's comments in oral argument may never be used to impeach the final order, however valuable to illustrate the court's theory they might be under some circumstances.'" (*Ibid*.) "Nor is an oral [or tentative] ruling necessarily the unequivocal decision of the court. A court may change its ruling until such time as the ruling is reduced to writing and becomes the [final] order of the court." (*In re Marcus* (2006) 138 Cal.App.4th 1009, 1016.)

In sum, there is no evidence the litigation had anything to do with the KSE Proposal or the Purchase at all. Had Outdoor ultimately consummated the IMOH agreement with better terms, it might be a different story. But the KSE Proposal and Purchase were altogether independent from the IMOH Agreement, and the Complaint and litigation were irrelevant in that context. Defendants overcame the presumption of causation and defeated plaintiffs' claim for attorney fees. The trial court did not abuse its discretion in denying the motion.

DISPOSITION

The order is affirmed. Plaintiffs' request for judicial notice of the proxy statement is granted. The balance of its request is denied as is defendants' request for judicial notice. Defendants are entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.